STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Michael Talbot, P.J., Helene White and Kurtis T. Wilder, JJ.

KENNETH KARACZEWSKI,

Plaintiff-Appellee,

vs.

FARBMAN STEIN & CO. and
NATIONWIDE MUTUAL INSURANCE CO.

Defendants-Appellants.
_____/

Supreme Court No.: 129825

COA No.: 256172

Lower Court No.: 02-000480

BRIEF ON APPEAL – PLAINTIFF-APPELLEE

ORAL ARUGMENT REQUESTED

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COUNTER-STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE SUPREME COURT

MCL 418.861(a)(14) provides:

> "The findings of fact made by the Commission acting within its powers, in the absence of fraud, shall be conclusive. The Court of Appeals and the Supreme Court shall have the power to review questions of law involved with any final order of the Commission, if application is made by the agreed party within 30 days after the order by any method permissible under the Michigan court rules."

COUNTER-STATEMENT OF QUESTION INVOLVED

WHERE PLAINTIFF'S EMPLOYMENT CONTRACT WITH DEFENDANT, A MICHIGAN EMPLOYER, WAS ENTERED INTO IN MICHIGAN, DOES THE BUREAU OF WORKER'S DISABILITY COMPENSATION HAVE SUBJECT MATTER JURISDICTION OVER HIS CLAIM BASED ON WORK RELATED INJURIES WHICH OCCURRED WHILE HE WAS WORKING FOR DEFENDANT IN FLORIDA?

Plaintiff-Appellee, Kenneth Karaczewski, answers "Yes".

Defendant-Appellant, Farbman Stein & Company, answers "No".

The Board of Magistrate answered, "Yes".

The Worker's Compensation Appellate Commission answered "Yes".

The Court of Appeals, answered "Yes".

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The facts in this matter were presented via a stipulation signed by the parties. The stipulation states:

"Plaintiff was hired by defendant on October 4, 1984 to work in Michigan as a maintenance engineer. As of the date of hire, plaintiff was a resident of Detroit, Michigan and defendant employer was a resident employer in Michigan. The contract of hire was made in Michigan. The Farbman Group continues to be a resident employer and is currently located at 28400 Northwestern Hwy, Southfield, Michigan.

Plaintiff worked for defendant in Michigan from the date of hire until September 1, 1986, when defendant transferred him to Fort Lauderdale, Florida to assume the position of building superintendent. On January 12, 1995, plaintiff fell from a ladder in the course of his employment for defendant in Florida, breaking his left wrist and injuring his left knee. At the time of the injury, he was a resident of Florida. On September 27, 1996, plaintiff reinjured his knee while still working for defendant in Florida. He underwent surgery on November 6, 1996 for ACL reconstruction and microfracture arthroplasty. Plaintiff returned to work for defendant with restrictions on December 2, 1996.

He received certain benefits pursuant to Florida's worker's compensation law.

Plaintiff continued to work for defendant until September 15, 1997. Since that time, he has worked as a project manager for Rotella, Toroyan, Clinton Group, a Florida corporation.

Plaintiff continues to have problems with his left knee. There is no wage loss at this time. He has, however, incurred further expenses for treatment and anticipates the

need for additional surgery(ies) and future closed period(s) of disability. These claims are not covered under Florida law.

Plaintiff has filed an application for mediation or hearing, claiming medical and wage loss benefits under Michigan law. Appellants' Appendix 1a-3a. Defendant disputes jurisdiction. It does not dispute the "existence of a work related knee injury."

In a decision mailed November 4, 2002, Magistrate Stephen C. Oldstrom found that, based on *Boyd v W G Wade Shows*, 443 Mich 515 (1993), Michigan has subject matter jurisdiction over plaintiff's work related injuries. Appellants' Appendix at 10a-12a.

The Worker's Compensation Appellate Commission affirmed the Magistrate's Opinion and Order on May 26, 2004. *Karaczewski v Farbman Stein & Co*, 2004 ACO #133. Appellants' Appendix at 13a -20a.

Defendants filed an Application for leave to Appeal with the Court of Appeals. In an unpublished Order dated November 4, 2004, the Court of Appeals granted defendants' application. *Karaczewski v Farbman Stein & Co*, Docket no. 256172. In an unpublished decision dated October 18, 2005, *Karaczewski v Farbman Stein & Co*, Docket no. 256172, the Court of Appeals affirmed the Magistrate's Opinion and Order. Appellants' Appendix 22a-26a. The Court of Appeals observed:

"The Supreme Court concluded that *Roberts* should not be overruled:

> If the allegedly 'out-dated' *Roberts* decision is overruled by this Court, then a significant gap in coverage will exist in this state's compensation scheme. Specifically, all Michigan employees who suffer an out-of-state injury in the course of their employment and who reside in neighboring states will not be subject to the bureau's jurisdiction. We believe that such a jurisdictional scheme is not only undesirable by also

> unduly restrictive. . . . *Roberts* remains an effective means of retaining a fair and consistent scheme for extraterritorial jurisdiction. This Court has stated that a court will not overrule a decision deliberately made unless the Court is convinced not merely that the case was wrongly decided, but also that less injury would result from overruling than from following it. Clearly, because of the gap in coverage that would result, overruling *Roberts* would cause a far greater injury than allowing *Roberts* to stand. [*Boyd, supra* at 523-525. Citation and footnote omitted.]

This Honorable Court also noted the legislature had acquiesced to *Roberts* for over sixty years by revising the workers' disability compensation act several times and never taking any action to indicate its disapproval of *Roberts'* interpretation of the jurisdictional requirements. *Boyd, supra* at 525-526. This Court concluded:

> pursuant to § 845 of the workers' disability compensation ct and *Roberts v IXL Glass Corp, supra*, the Bureau of Workers' Disability Compensation shall have jurisdiction over extraterritorial injuries without regard to the employee's residence, provided the contract of employment was entered into in this state with a resident employer. [*Boyd, supra* at 526)"

Defendants filed an Application for Leave to Appeal with this Honorable Court on November 2, 2005. Subsequently, on March 24, 2006, this Honorable Court granted Leave to Appeal. Appellants' Appendix at 27a.

ARGUMENT

WHERE PLAINTIFF'S EMPLOYMENT CONTRACT WITH DEFENDANT, A MICHIGAN EMPLOYER, WAS ENTERED INTO IN MICHIGAN, THE BUREAU OF WORKER'S DISABILITY COMPENSATION HAS SUBJECT MATTER JURISDICTION OVER HIS CLAIM BASED ON WORK RELATED INJURIES WHICH OCCURRED WHILE HE WAS WORKING FOR DEFENDANT IN FLORIDA.

The only issue in this matter is whether Michigan has jurisdiction over plaintiff's knee injuries, which occurred while he was working for defendant in Florida. Defendants do not dispute that plaintiff suffered work related injuries to his left knee and that he requires treatment for those injuries.

There is also no dispute that jurisdiction in this case is controlled by this Honorable Court's decision in *Boyd v W G Wade Shows*, 443 Mich 515 (1993). For the reasons this Court noted in Boyd, it is appropriate that this case should be controlled by the determination made in *Boyd.*

In *Boyd*, the Court reaffirmed its long-standing decision in *Roberts v I X L Glass Corp*, 259 Mich 644 (1932) and concluded that, pursuant to Section 845 of the Act [MCL 418.845; MSA 17.237(845)], the bureau has jurisdiction over extraterritorial injuries "without regard to the employee's residence", provided that the contract of hire was made in Michigan with a resident employer. *Id*, at 526.

The facts in Mr. Karaczewski's case fit squarely within the holding in *Boyd.* Plaintiff was hired to work in Michigan by defendant Farbman Stein, a resident employer. His connection to this state is strengthened by the fact that he also was a

Michigan resident when he entered into the contract of employment. *Boyd* requires that the Michigan bureau assert jurisdiction over Mr. Karaczewski's knee injuries in Florida.

The *Boyd* holding that Michigan has subject matter jurisdiction in the circumstances herein has not been modified or reversed. Such modification or reversal is barred by the doctrine of *stare decisis*, which promotes stability and predictability in rules of law to guide behavior and protects those rules from the vicissitudes of political changes on the courts. Although *stare decisis* is not absolute, the question of jurisdiction that this case poses requires that the doctrine be applied with full force.

This Honorable Court decided *Roberts* in 1932. By 1993, when the Court considered Boyd, Roberts had "become ensconced as part of the overall workers' compensation scheme." Boyd, supra, at 527 (Brickley, J., concurring). It has become even more "ensconced" in 2004, after the Boyd Court reconsidered and affirmed its holding.[1]

As if being part of the overall workers' compensation system for more than seventy years is not enough, the Roberts/Boyd jurisdictional scheme has not been changed by the Legislature despite numerous opportunities to do so. This Court has stated repeatedly that *stare decisis* must be respected in connection with decisions construing statutes, especially where the Legislature acquiesces in the Court's interpretation by reenacting or failing to change the statutory language. *Boyd, supra*, at

[1] The degree to which *Roberts* has become an established part of Michigan law is further illustrated by Larson's declaration that it rendered the residency requirement a dead letter. 4 Larson, Workmen's Compensation, SS 87.12, p 16-71.

525, citing *Dean v Chrysler Corp*, 434 Mich 655 (1990); *Consumers Power Co v Muskegon Co*, 346 Mich 243 (1956). Although there have been major legislative changes in the Worker's Disability Compensation Act since the *Boyd* decision, the language of Section 845 has remained the same. Certainly, the Legislature knows how to and does not hesitate to change the language of the Act to reverse judicial action: witness the amendments redefining the standard for compensability in psychiatric claims in Section 301(2) [MCL 418.301(2); MSA 17.237(301)(2)] following the decision in Deziel v Difco Laboratories Inc (After Remand), 403 Mich 1 (1978).

That Legislative inaction represents an endorsement of *Roberts*' elimination of a residency requirement for subject matter jurisdiction is further demonstrated by the fact that such inaction occurred in the face of the *Roberts* Court's implied request to the Legislature to do something if it disapproved. As stated by Judge Levin in his dissent in Austin v W B Walker Co, 11 Mich App 311 (1968):

> It is now 35 years since *Roberts* was decided. Whatever may have been the legislative intention at the time of adoption of the residency requirement (CL 1948, § 413.19 [Stat Ann 1960 Rev § 17.193]), it would be inappropriate at this late date to attempt to breathe new life into a statutory provision which was aborted so long ago. If the legislature desired to insist on a residency requirement, it could have done so at any time within the last 35 years; it was inferentially invited to do so in *Roberts*, p 649. [footnotes omitted] [2]

The Legislature's acknowledgement of the extraterritorial reach of the Act is also reflected in its enactment of Section 846 in 1982, to provide a credit to Michigan for disability payments an injured employee receives in another state for the same personal

[2] It should be noted that, although *Judge* Levin dissented from the court's application of *Roberts in Austin, supra*, as *Justice* Levin, he joined the majority opinion in *Boyd*.

injury. MCL 418.846; MSA 17.237(846)

Subject matter jurisdiction is a threshold question that involves the most basic policy embodied in the Act. The Legislature cannot have ignored that issue. The Legislature's seventy-year failure to change *Roberts/Boyd* can only be regarded as approval. The Court of Appeals agreed with this reasoning stating:

> "The Supreme Court also noted the legislature had acquiesced to *Roberts* for over sixty years by revising the workers' disability compensation act several times and never taking any action to indicate its disapproval of *Roberts'* interpretation of the jurisdictional requirements. *Boyd, supra* at 525-526. The Supreme Court concluded:
>
> > pursuant to § 845 of the workers' disability compensation ct and *Roberts v IXL Glass Corp, supra*, the Bureau of Workers' Disability Compensation shall have jurisdiction over extraterritorial injuries without regard to the employee's residence, provided the contract of employment was entered into in this state with a resident employer. [*Boyd, supra* at 526)"

Plaintiff agrees with defendants that the courts have jurisdiction to construe and apply statutory language. With respect to Section 845, at issue in this case, this Court has already done so, twice. As even defendants admit in their brief, courts have construed the word "and" to mean "or", consistent with the *Boyd/Roberts* interpretation of Section 845. See, *Esperance v Chesterfield Twp*, 89 Mich App 456; 280 NW2d 559 (1979). But how the courts interpret other provisions of the Worker's Disability Compensation Act or other statutes is irrelevant. The issue is how they have interpreted Section 845, and that issue is settled.

This honorable Court has twice construed Section 845 to hold that Michigan has jurisdiction over injuries such as Mr. Karaczewski's. And, the Legislature has acquiesced.

As much as defendants want to discredit the doctrine of legislative acquiescence, this Court has not. The *Boyd* Court in 1993 was certainly aware of Justice Voelker's earlier criticism of that doctrine in *Van Dorpel v Haven-Busch Co*, 350 Mich 135; 85 NW2d 98 (1957). Nevertheless, it cited legislative inaction in affirming *Roberts. Boyd, supra*, at 524.

Two decisions by this Honorable Court. More than 70 years of practice. Legislative acquiescence. Enough is enough.

There are also significant policy considerations which militate against disturbing the *Boyd/Roberts* precedent. In *Boyd*, the Court held that reversing *Roberts* would create a "significant gap in coverage" in Michigan's worker's compensation scheme. *Id*, at 523. That it was unwilling to do.

Further, Mr. Karaczewski has an even closer connection to the state of Michigan than did Mr. Boyd. At the time the contract of hire was entered into with the Michigan employer, Mr. Karaczewski was a Michigan resident; Mr. Boyd was not. Mr. Karaczewski worked in Michigan; it appears that Mr. Boyd did not.

To advance its own business purposes, the defendant employer chose to transfer Mr. Karaczewski to Florida, where he was injured. He is no longer eligible for compensation under Florida law. It would violate the remedial purpose of the Act in favor of granting rather than denying benefits to allow defendants to completely escape liability for further treatment and wage loss for plaintiff's work related injuries and disability. It is not unfair to defendants to impose liability in these circumstances; defendant employer is still a Michigan corporation and has elected to submit to Michigan laws. It cannot deny responsibility for plaintiff's injury.

In *Wallace v Consolidated Freightways*, 199 Mich App 141 (1993), plaintiff, a resident of Indiana working for an Indiana corporation, was injured in Michigan. After he received all the benefits to which he was entitled under Indiana law, he filed a claim in Michigan. The court held that the Michigan bureau had jurisdiction to hear Wallace's claim based on the broad grant of jurisdictional power authorized by Section 111 of the Act. MCL 418.111; MSA 17.237(111). The same broad grant of jurisdiction must apply in this case.

Courts may depart from a literal construction of a statutory provision when it would lead to absurd and unjust results inconsistent with the purposes and policies promoted by the act in question. *Salas v Clements*, 399 Mich 103, 109 (1976). *Stare decisis*, legislative acquiescence and the remedial purpose of the Act require that Michigan assert subject matter jurisdiction over Mr. Karaczewski's claim.

The Board of Magistrates, the Appellate Commission and the Court of Appeals agreed. There is no basis to change that opinion. The decisions of this honorable Court in *Boyd* and *Roberts* control the result in Mr. Karaczewski's case. Michigan has jurisdiction to consider his claim. The Court of Appeals decision in this case should be affirmed.

Application of *Robinson v City of Detroit*

This Honorable Court requested the parties to address the issue of whether the proposed overruling of *Boyd v W G Wade Shows*, 443 Mich 515 1993, "is justified under the standard in *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000)."

Robinson dictates as follows:

> "*Stare decisis* is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decision, and contributes to the actual and perceived integrity of the judicial process.'" 462 Mich at 463

The Court explicates further that determining whether to overrule prior precedent should involve an analysis of whether the prior case was wrongly decided, but that "the mere fact an earlier case was wrongly decided does not mean overruling it is invariably appropriate. 462 Mich at 465. The Court goes on:

> "Rather, the Court must proceed on to examine the effects on reliance interests and whether overruling would work an undue hardship because of that reliance."

Ultimately, this Court indicates that:

> "As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real–world dislocations. It is in practice a prudential judgment for a court."

In analyzing the possibility of overruling a prior precedent in this case, we must first recognize this Honorable Court has to consider overruling not one, but two opinions and judgments of this Court bearing on this precise issue. Fourteen members of this Court have previously examined the issue of a residency requirement for an extra-

territorial injury sustained in employment when the contract of employment was entered into in Michigan.

Initially in 1932 in the *Roberts* case, a unanimous seven member Court concluded that a similarly worded statute as is considered today should not be interpreted to require the plaintiff to be a resident of Michigan at the time of the injury so long as the contract of hire was entered into in the State of Michigan. In *Boyd*, 61 years later, five of seven justices agreed that *Roberts* should be followed. There is an interesting concurrence in *Boyd* by Justice Brickley. Justice Brickley agreed that the decision in *Roberts* was contrary to the plain meaning of the language of the statute. But he agreed that the case should not be overruled. He stated:

> "However, I concur with the majority because I agree with its determination that, after fifty years of legislative acquiescence, the *Roberts* decision has become ensconced as part of the overall workers' compensation scheme. I believe that the principle of *stare decisis* prevails over the need to correct an incorrect interpretation of the statute." 443 Mich at 527.

The observation of Justice Brickley ties in with the *Robinson's* Court's analysis regarding reliance interests and the "embeddedness" of the decisional authority questioned. It is respectfully submitted that the concepts established in *Roberts* in 1932 and re-affirmed in *Boyd* in 1993 are "embedded" in Michigan Workers' Compensation law. The Michigan Workers' Compensation law has been in effect since 1912, and it is evident from a review of the *Roberts* decision that the Workers' Compensation policy and procedure has been to recognize that the Michigan law applied to non-resident injuries. The *Roberts* court pointed out:

> "If the legislature did not intend the amended act to be thus construed, we think it would have clearly so indicated by using a few simple words to that effect in the 1921 amendatory act. . . ." 259 at 649.

Thus, this principle has been part of the Michigan Workers' Compensation scheme for the entire period that Michigan has had a Workers' Compensation law. To analyze "reliance" interests in prior precedent becomes somewhat difficult from the injured plaintiff's perspective. The reality of course is that a worker does not generally anticipate being injured and seeking compensation. Generally, as in this case, there is an unexpected injury. But, an injured worker may have certain expectations regarding his right to compensation because of the state he resided in at the time of entering into the contract of hire. He may have a recognition that Michigan, as a progressive and an industrialized state, has a greater degree of concern for its workers and their potential for injury than a non-industrialized, non-progressive state might recognize. And that clearly is part of the message in *Roberts* and *Boyd*. The *Boyd* Court noted that overruling *Roberts* would create "a significant gap in coverage" within the State Workers' Compensation System. Obviously, that "gap" is operative here as Florida has not provided a fully effective remedy to the instant plaintiff. Further, at the point that an injury has occurred in a circumstance such as this one, an injured worker may well be expected to contact an attorney. An attorney generally familiar with Michigan Workers' Compensation law can legitimately be expected to realize that such out of state injuries as this one are covered by Michigan law.

From a defendant's perspective, a self-insured or an insurance company covering the risks for workers' compensation liability in the State of Michigan should have an awareness of the prior decisions and controlling law on extra-territorial injuries.

Although we do not have record evidence on this issue, it is reasonable to assume that profit-seeking insurance companies or self-insureds operating in the State of Michigan know or should know of the various risks which they will be required to cover. Thus, overruling prior precedent simply provides a windfall to the Workers' Compensation self-insureds and insurance companies, as well as changing legitimate expectations of an injured employee. It is respectfully submitted that these are further *indicia* of reliance and reasons to maintain the status quo.

Thus, from the perspective of the Michigan Workers' Compensation legal community (both plaintiff and defendant) as well as from the insurance company and self-insured perspective, there has been a reliance interest on the continuing validity of *Roberts* and *Boyd*. Thus, at least, derivatively an injured worker would have these expectations. Further, independently, an injured worker sustaining an extra-territorial injury could also recognize that Michigan, as a progressive, industrialized state having concern for its workers both in state and out of state, would be expected to provide a mechanism of relief. Thus, it is respectfully submitted that there has been a reliance interest established with regard to this honorable Court's prior precedents in *Roberts* and *Boyd*.

RELIEF

WHEREFORE, plaintiff-appellee respectfully requests that this Honorable Court confirm the Court of Appeals decision in this case.

Respectfully submitted,

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Dated: May 30, 2006

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RUTH E. HARVEY certifies that she provided Plaintiff-Appellee's Brief on Appeal upon Martin L. Critchell, Attorney for Defendants-Appellants, 30700 Telegraph, Ste. 2580, Bingham Farms, MI 48025-4526 and Kym L. Worthy, County of Wayne, 11th Floor, 1441 St. Antoine, Detroit, MI 48226, by First Class U.S. Mail, on May 30, 2006.

_____
RUTH E. HARVEY